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No. 86-835

In the Supreme Court of the United States

OCTOBER TERM, 1986

THOMPSON MEDICAL COMPANY, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission's order in this case is supported by substantial evidence.

2. Whether the Commission's order is impermissibly vague.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 791 F.2d 189. The opinion and order of the Federal Trade Commission (Pet. App. 36a-255a) are reported at 104 F.T.C. 786. The initial decision of the administrative law judge (Pet. App. 256a-678a) is reported at 104 F.T.C. 660.

JURISDICTION

The judgment of the court of appeals (Pet. App. 679a-680a) was entered on May 27, 1986. A petition for rehearing was denied on August 25, 1986

(Pet. App. 683a-684a). The petition for a writ of certiorari was filed on November 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner markets a non-prescription lotion called "Aspercreme" as a remedy for minor arthritis pain. On February 5, 1981, the Federal Trade Commission issued an administrative complaint against petitioner and petitioner's advertising agency, alleging that petitioner's advertisements for Aspercreme were in several respects false, deceptive, and unfair, and therefore violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. 45 and 52. See Pet. App. 36a-42a.[1] After "extensive pretrial discovery" (*id.* at 257a) and several months of evidentiary proceedings, the administrative law judge (ALJ) found that petitioner's advertising was deceptive and issued an order embodying most of the relief requested in the complaint (*id.* at 263a-678a).

The Commission upheld the ALJ's determination (Pet. App. 36a-245a), concluding that three categories of representations contained in petitioner's advertising were false and deceptive. First, the Commission found that petitioner's advertisements "suggest that Aspercreme contains aspirin" (*id.* at 65a), noting that the advertisements refer to "the strong relief of aspirin" and that one segment of petitioner's television commercials consists of a picture of aspirin tablets that dissolves into a picture of a tube of Aspercreme; other evidence, including consumer surveys, also indicated that consumers received the

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[1] The advertising agency entered into a consent decree and is no longer a party to this proceeding (see Pet. App. 42a n.3).

impression that Aspercreme contained aspirin (*id.* at 62a-113a). The Commission found that "[t]he active ingredient in 'aspirin' is acetylated salicylate, whereas the active ingredient in Aspercreme is TEA/S [trolamine salicylate]. The two are not the same. Therefore, the claim that Aspercreme contains aspirin is false" (*id.* at 156a). The Commission also determined that this misrepresentation was material because it was "likely to affect a consumer's choice of or conduct regarding a product" (*id.* at 143a).

Second, the Commission concluded that petitioner's advertisements represent that "Aspercreme is more effective than aspirin tablets because it works faster than aspirin tablets, or works without aspirin's side effects such as upset stomachs, or both" (Pet. App. 125a). Because petitioner's statements regarding Aspercreme's effectiveness refer to "clinical tests," the Commission found it reasonable "for consumers to expect that the claims that Aspercreme is faster and more effective than aspirin would be substantiated in a manner acceptable to the medical scientific community" (*id.* at 135a, 136a (footnote omitted)). It concluded that this representation was false because "the standard generally adhered to by the medical scientific community for testing the efficacy of a drug is the possession of two well-controlled clinical tests" and the tests submitted by petitioner fell short of that requirement (*id.* at 160a-161a).

Third, petitioner admitted that its advertisements represent that Aspercreme is effective for the relief of minor arthritis and rheumatic conditions, that Aspercreme is as effective as aspirin for the relief of minor arthritis and its symptoms, and that Aspercreme acts by penetrating through the skin to the site of the arthritic disorder (Pet. App. 55a-57a).

The Commission found that these claims were "objective product claims impliedly representing an unspecified level of substantiation" and therefore fell within its general rule "that advertisements containing objective product claims [must] be supported by a reasonable basis" (*id.* at 132a, 142a).

The Commission noted that its decisions had "identified several factors that [it] will weigh in determining the appropriate level of substantiation for objective advertising claims" (Pet. App. 163a). These factors include: "(1) the product involved; (2) the type of claim; (3) the benefits of a truthful claim; (4) the ease of developing substantiation for the claim; (5) the consequences of a false claim; and (6) the amount of substantiation experts in the field would agree is reasonable" (*id.* at 163a-164a (footnote omitted)). Applying these factors to the circumstances of this case, the Commission concluded that petitioner "should possess two well-controlled clinical tests to have a reasonable basis for its Aspercreme efficacy claims" (*id.* at 165a-166a). It found that petitioner had failed to present valid test results establishing the efficacy of Aspercreme, and that its claims regarding the product's effectiveness therefore were false and misleading (*id.* at 187a-188a).[2]

The Commission issued a cease and desist order barring petitioner from representing that Aspercreme contains aspirin and requiring petitioner to include in its advertising an affirmative statement that the product does not contain aspirin (Pet. App. 247a-251a). The order also prohibits petitioner from

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[2] The Commission found that petitioner had represented Aspercreme as a new product (Pet. App. 124a-125a), but concluded that this claim was not false as alleged in the complaint (*id.* at 156a-159a).

representing that any of its non-prescription analgesic drug products are effective in relieving minor pain unless that representation is supported by "at least two adequate and well-controlled, double-blinded clinical studies" (*id.* at 253a).[3]

2. The court of appeals upheld the Commission's order (Pet. App. 1a-35a). The court observed that petitioner "correctly acknowledges that in general an advertisement is considered deceptive if the advertiser lacks a 'reasonable basis' to support the claims made in it"; it found that the thrust of petitioner's claim was that the Commission had erred in selecting the level of support that constituted a reasonable basis in the circumstances of this case (*id.* at 16a-17a (citations omitted)). The court rejected petitioner's challenge to the Commission's determination that petitioner's efficacy claims must be justified by the results of two clinical studies.

Noting that the Commission previously had not required a manufacturer to produce clinical tests in support of its efficacy claims, the court found that "[d]espite the FTC's departure from [these prior decisions], its reasoning in arriving at the requirement of clinical testing *is* well-founded in precedent. That is, the Commission carefully reviewed the factors laid out in its precedents before concluding that a two-clinical-test standard was appropriate here"

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[3] The Commission noted with respect to claims of efficacy other than comparative claims that "if the Food and Drug Administration promulgates any final standard which establishes conditions under which such product is safe and effective under the Food, Drug and Cosmetic Act, then in lieu of the above, [petitioner] may rely upon scientific evidence which fully conforms to such final standards as a reasonable basis for said representation" (Pet. App. 253a-254a).

(Pet. App. 22a-23a (emphasis in original)). The Commission's failure to adopt that standard in prior cases, the court stated, did not "amount to proof that the FTC acted contrary to law in imposing a higher standard in this case" (*id.* at 25a-26a). The court characterized the Commission's analysis as "extensive and painstaking" (*id.* at 24a) and, noting the Commission's "special expertise in determining what sort of substantiation is necessary to assure that advertising is not deceptive," the court "decline[d] to interfere with [the Commission's] exercise of that discretion in the circumstances of this case" (*id.* at 28a).

The court also rejected petitioner's challenge to the Commission's determination that the test results submitted by petitioner did not support the Aspercreme efficacy claims. Stating (Pet. App. 30a) that it "deplore[d] [petitioner's] attempt to retry this matter before us," the court indicated that substantial evidence supported the Commission's determination that the test evidence was not sufficient to satisfy the reasonable basis standard.[4]

ARGUMENT

The decision of the court below is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

1. Responsibility for determining whether an administrative decision is supported by substantial

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[4] The court also rejected petitioner's claim that the Commission lacked jurisdiction over this case because of an ongoing review of non-prescription drugs by the Food and Drug Administration (Pet. App. 10a-16a) and the contention that the FTC erred by requiring petitioner to disclose that its product does not contain aspirin (*id.* at 31a-35a).

evidence is vested in the courts of appeals; this Court will intervene only in "the rare instance when the standard appears to have been misapprehended or grossly misapplied." *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981) (citation omitted); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Petitioner seeks this Court's intervention on two grounds. It first asserts (Pet. 10-16) that the court of appeals violated "well settled principles of judicial review" because it "did not review the record support" to determine whether substantial evidence supported the Commission's finding that petitioner's efficacy claims lacked a reasonable basis. Second, petitioner argues (Pet. 16-20) that the Commission's determinations are not supported by substantial evidence. Neither of these claims comes close to justifying review by this Court.

a. This case involves the settled principle that certain advertising claims that lack a reasonable basis are unfair and deceptive and, therefore, violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. III) 45. See *In re Pfizer*, 81 F.T.C. 23, 64 (1972); see also *American Financial Services Ass'n* v. *FTC*, 767 F.2d 957, 979-980 n.27 (D.C. Cir. 1985), cert. denied, No. 85-796 (Feb. 24, 1986); *American Home Products Corp.* v. *FTC*, 695 F.2d 681, 692, 693 (3d Cir. 1982). In applying that principle, it is necessary to ascertain (1) the amount of substantiation that constitutes a "reasonable basis," and (2) whether the advertiser has adduced evidence that satisfies the particular substantiation requirement. The Commission here determined that two clinical tests were required to substantiate petitioner's claims regarding the efficacy of Aspercreme and that the evidence proffered by petitioner did not satisfy that standard.

The court of appeals recognized—and petitioner does not dispute—that the Commission correctly identified the settled legal principles that control this case (Pet. App. 22a-23a); the controversy between the parties concerns the application of those standards in the particular factual circumstances presented here. Both parties filed briefs that extensively discussed whether the Commission erred in finding that petitioner's efficacy claims did not have a reasonable basis. See Pet. C.A. Br. 11-41; FTC C.A. Br. 18-48. And much of the court of appeals' decision is devoted to that issue (Pet. App. 16a-31a). It is therefore clear that the court of appeals did not abdicate its statutory duty to review the Commission's decision.

Contrary to petitioner's apparent contention, the court of appeals was not required expressly to discuss and reject each of petitioner's claims in order to prove that it carried out its review function. The opinions of the ALJ and the Commission contain detailed discussion of the relevant facts. A court applying the substantial evidence standard need only determine that the evidence is sufficient to support the agency's decision; it is not obligated to restate or otherwise specifically discuss every contention of the party challenging the agency decision.

The court of appeals' opinion in this case shows that the court made a fair assessment of the record as a whole and concluded that substantial evidence supported the Commission's determination. In assessing the Commission's finding that two clinical tests are required to substantiate petitioner's efficacy claims, the court of appeals found the Commission's analysis to be "extensive and painstaking," and concluded that the Commission's determination was

proper under the particular facts of this case (Pet. App. 17a, 24a).[5]

The court of appeals next examined the Commission's finding that the evidence relied upon by petitioner did not satisfy the clinical test standard. Characterizing petitioner's argument as an invitation to reweigh the evidence (Pet. App. 31a), the court declined to perform that function. As the court correctly stated in sustaining the Commission's finding, its task was limited to determining whether that finding was "supported by substantial evidence on the record as a whole"; the court plainly fulfilled that statutory responsibility. Pet. App. 30a-31a; see also *FTC* v. *Indiana Federation of Dentists*, No. 84-1809 (June 2, 1986), slip op. 6.[6]

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[5] The court's statement that it "decline[d] to interfere with [the Commission's] exercise of * * * discretion [to determine the appropriate level of substantiation] in the circumstances of this case" (Pet. App. 28a) is simply a restatement of the fact that the Commission has considerable expertise in determining when an advertising practice is deceptive. See *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). The statement was made only *after* the court had concluded that the Commission's imposition of the "two clinical test" standard was reasonable and well supported (see Pet. App. 23a-28a). Petitioner's claim (Pet. 12) that this statement shows that the court failed to examine the record is thus entirely without foundation.

[6] Citing the court of appeals' characterization (Pet. App. 30a) of petitioner's substantial evidence claim as "an attempt to [relitigate] this matter before us," petitioner claims (Pet. 15-16) that the court of appeals never considered the substantial evidence claim. But the court of appeals was well aware that petitioner purported to raise a substantial evidence claim (Pet. App. 2a). The court simply concluded that, although petitioner paid lip service to the substantial evidence standard, petitioner actually sought a complete reassessment of

b. Moreover, the court of appeals' conclusion that the Commission's determination is supported by substantial evidence is clearly correct. The evidentiary support for each of the Commission's key findings is described at length in the Commission's opinion and in the detailed findings of the ALJ. There can be no doubt that these findings were supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (*FTC* v. *Indiana Federation of Dentists*, slip op. 6 (citation omitted)).

First, the Commission reasonably determined that two clinical tests were required to substantiate petitioner's claims regarding the efficacy of Aspercreme. Applying the criteria set forth in its prior decision in *In re Pfizer*, *supra*, to the facts of this case, the Commission reached the following well-supported conclusions:

(1) Aspercreme is a drug product with claimed health benefits in treating the symptoms of rheumatic disease, a serious and chronic condition;[7]

(2) consumers cannot evaluate the Aspercreme efficacy claims for themselves;[8]

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the evidence—an inquiry precluded by the substantial evidence standard (*id.* at 30a-31a).

[7] This conclusion rests upon undisputed facts evident from both petitioner's advertising and expert testimony (see Pet. App. 389a-402a, 430a-435a).

[8] Expert testimony and Food and Drug Administration (FDA) panel reports demonstrate that factors such as the placebo effect, the use of concomitant medications, and the self-limiting nature of arthritis pain combine to prevent consumers from evaluating the true efficacy of Aspercreme in an uncontrolled environment (Pet. App. 168a-170a, 436a-444a). Petitioner's flat assertion (Pet. 17) that this finding is not supported by substantial evidence provides no basis for challenging the conclusion reached by the Commission.

(3) in view of the large potential market, the cost of conducting two clinical tests is modest and is thus unlikely to deter new product development; [9]

(4) a false claim would have significant economic consequences—the repeated purchase of an ineffective product by consumers unable to evaluate its efficacy; [10] and

(5) the medical/scientific community requires that the effectiveness of a product like Aspercreme be demonstrated by two clinical tests.[11]

Since all of the *Pfizer* factors thus weigh in favor of requiring two clinical tests to support petitioner's efficacy claims, the Commission's decision to adopt

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[9] The only experts to address the issue agreed that the cost for two clinical tests would not exceed $30,000 (Pet. App. 173a, 449a-450a). Contrary to petitioner's claim (Pet. 17 & n.19), it is not clear that such tests are difficult to perform; a minority report to the FDA panel report cited by petitioner rejected the majority's conclusion regarding the difficulty of performing such tests (see 44 Fed. Reg. 69789 (1979)). In any event, the entire panel concluded that such tests should be performed for unproven products, such as those containing the active ingredient found in Aspercreme (*id.* at 69857-69858).

[10] Expert testimony, statements from the Arthritis Foundation, and a document from petitioner's advertising agency establish the significant economic cost of ineffective arthritis remedies (Pet. App. 447a-449a). Petitioner admitted that Aspercreme's annual sales were approximately $6 million in the early 1980's (*id.* at 348a).

[11] This finding is supported by expert testimony, FDA regulations, and the positions of two expert FDA panels (Pet. App. 177a-182a, 451a-457a). Petitioner's claim to the contrary (Pet. 18 & n.21) rests upon testimony that was rejected by the Commission and the ALJ (Pet. App. 184a-185a, 454a-455a).

that requirement plainly is supported by substantial evidence.[12]

Second, the Commission correctly found that the evidence proffered by petitioner did not satisfy this standard. In detailed findings adopted by the Commission, the ALJ exhaustively reviewed all of petitioner's supporting material and determined that, by virtue of its limitations and deficiencies, it was inadequate to substantiate the efficacy claims (Pet. App. 187a-188a, 473a-642a). The clinical studies submitted by petitioner were rendered invalid by one or more fatal flaws;[13] the remainder of petitioner's purported substantiation fails to rise to the

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[12] Petitioner implies (Pet. 13, 18 n.22) that the Commission's determination here was incorrect because the Commission has not required this sort of substantiation in prior cases. But those prior decisions necessarily are tied to the factual records in those cases; the Commission did not state in its decisions in those cases that such substantiation never could be required. Indeed, as petitioner acknowledges (*id.* at 13), such substantiation has been required for other sorts of efficacy claims. And the Commission and the court of appeals both correctly determined that it was not inconsistent with either precedent or logic for the Commission to conclude as a factual matter in this case that petitioner's drug efficacy claims would be deceptive and unfair unless substantiated by the accepted level of scientific proof (Pet. App. 22a-28a, 161a-184a).

[13] The invalidity of these studies was demonstrated through extensive expert testimony (Pet. App. 187a-188a, 473a-540a). Moreover, as the court recognized, petitioner's suggestion (Pet. 19) that the Commission lacks the expertise to evaluate its clinical studies is patently absurd. Pet. App. 13a; cf. *Thompson Medical Co.* v. *Ciba-Geigy Corp.*, 643 F. Supp. 1190, 1198 (S.D.N.Y. 1986) (district court evaluated clinical studies submitted by petitioner as support for advertising claims).

level of clinical tests and, in addition, was found by the Commission to be methodologically flawed or otherwise deficient.[14] It is noteworthy that both the Food and Drug Administration (FDA)—in its tentative final monograph—and the FDA's expert panel on external analgesics have categorized the active ingredient in Aspercreme as a substance of unproven effectiveness (*id.* at 180a-182a, 185a-186a).

For these reasons, petitioner's fact-bound argument that the Commission's findings are not supported by substantial evidence is refuted by the record; further review by this Court is not warranted.

2. Petitioner also challenges the Commission's order on the grounds (Pet. 20-24) that the order is impermissibly vague and violates the First Amendment. As a threshold matter, petitioner did not properly raise this issue in the court below. The argument therefore is not appropriate for consideration by this Court. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[15] Moreover, similar arguments have been rejected by other courts of

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[14] For example, petitioner emphasizes its favorable responses from large numbers of consumers and health care professionals (Pet. 17). Yet the record shows that there were methodological deficiencies in the manner in which these responses were collected (Pet. App. 595a-604a). Furthermore, since neither consumers nor health care professionals are capable of evaluating the effectiveness of a product like Aspercreme under unblinded and uncontrolled conditions, experience with the product cannot provide the requisite evidence of efficacy (*id.* at 171a n.65, 436a-444a, 595a-597a).

[15] The issue was not discussed in any of the briefs in the court of appeals; it was raised by the court at oral argument (Pet. App. 701a-703a). The court did not address the vagueness issue in its opinion and petitioner did not raise the issue in its petition for rehearing.

appeals; there is no reason for the Court to review them here.

a. A remedial order issued by the Commission is sufficiently particular if it is "as specific as the circumstances will permit" (*FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 393 (1965)) and "avoid[s] raising serious questions as to [its] meaning and application." *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 368 (1962) (footnote omitted); *Litton Industries, Inc.* v. *FTC*, 676 F.2d 364, 369 (9th Cir. 1982). Courts have recognized that absolute precision is not possible or required in a remedial order that requires an advertiser to possess a reasonable basis for its claims. *Bristol-Myers Co.* v. *FTC*, 738 F.2d 554, 560 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *Litton Industries, Inc.* v. *FTC*, 676 F.2d at 373. Judged by these standards, the order in the present case plainly is not vague.

The order provides that petitioner may only make a claim of effectiveness for a non-prescription analgesic drug if the claim is supported by two clinical tests. A reasonable basis requirement could not be more precise than this; indeed, provisions of comparable scope cast in less specific terms have consistently been upheld on review when challenged on vagueness grounds. See *Sterling Drug, Inc.* v. *FTC*, 741 F.2d 1146, 1156-1157 (9th Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *Bristol Myers Co.* v. *FTC*, 738 F.2d at 560; *Litton Industries, Inc.* v. *FTC*, 676 F.2d at 373; *Sears, Roebuck and Co.* v. *FTC*, 676 F.2d 385, 400 (9th Cir. 1982); *Jay Norris, Inc.* v. *FTC*, 598 F.2d 1244, 1250-1251 (2d Cir.), cert. denied, 444 U.S. 980 (1979).[16]

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[16] As the court of appeals noted (Pet. App. 25a-28a), the order in the present case is *more* specific than the orders at

Petitioner focuses its attack upon the order's scope —the order applies to representations that a drug is "effective for the relief of minor pain" (Pet. App. 252a). Petitioner asserts that it cannot ascertain whether an advertising claim would be covered by the order because it cannot determine when an advertising claim relates to a product's effectiveness (Pet. 21-24).[17] But the applicable test is the standard applied by the Commission in this case—whether "consumers acting reasonably under the circumstances would interpret the advertisement to contain th[e] message" that Aspercreme will alleviate minor pain. Pet. App. 46a; see also *American Home Products Corp.* v. *FTC*, 695 F.2d at 687 (overall impression created by advertisement is determinative, not its literal truth or falsity). The bulk of petitioner's examples of the alleged overbreadth of the order (Pet. 23) are simply instances of statements likely to convey to a consumer the message that Aspercreme will alleviate minor pain.[18] As such, they properly are encompassed within the terms of the order.

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issue in these prior cases. Those orders defined "reasonable basis" in general terms as consisting of competent and reliable scientific evidence; the present order, by requiring two clinical tests, is far more specific.

[17] Petitioner asserts that the court of appeals "expressed great discomfort with the scope and ambiguity of the order" (Pet. 21). Significantly, however, the court did not find the order to be overbroad, or even discuss the issue in its opinion. This omission is not surprising, of course, in light of petitioner's failure to raise the issue below.

[18] For instance, petitioner argues (Pet. 23) the order would prohibit it from making the allegedly truthful claim that "[h]undreds of thousands" of arthritis sufferers rely on Aspercreme. Even if this express statement were literally true,

At bottom, petitioner's complaint is that it will not be able to make any claims about the effectiveness of Aspercreme without the proof required by the Commission. So long as the product's effectiveness is unproven, however, such claims are by definition misleading. Petitioner's dilemma thus flows solely from the fact that it sells a product without demonstrated efficacy, not from any vagueness in the Commission's order. As the court of appeals noted (Pet. App. 28a-29a), petitioner has no right to continue to engage in deceptive advertising, even if Aspercreme cannot be promoted successfully in any other way.

Moreover, petitioner can reduce its risk of violating the order in any of several ways. First, it can support its therapeutic efficacy claims with two well-controlled clinical studies. Second, it can secure from the Commission an advisory opinion as to the propriety of proposed advertising. Third, it can advise consumers that it has no reasonable basis for its efficacy claims. See *Sterling Drug, Inc.* v. *FTC*, 741 F.2d at 1157 (citation omitted).

b. Petitioner's First Amendment argument similarly lacks merit. The Commission's order is designed solely to prevent future deceptive advertising for analgesic drugs.[19] False, deceptive, or misleading ad-

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it clearly implies that Aspercreme is effective for arthritis pain. Absent appropriate substantiation (*i.e.*, clinical tests), this implied claim would be deceptive and is therefore properly prohibited by the order. On the other hand, petitioner's hypothetical claim that "FDA has determined that data is not available demonstrating that Aspercreme is effective" (*ibid.*) does not constitute a claim of effectiveness and is therefore not covered by the order.

[19] Unsubstantiated claims are inherently deceptive because consumers expect that the advertiser has an appropriate basis

vertising enjoys no constitutional protection and is subject to government regulation. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *In re R.M.J.*, 455 U.S. 191, 202-203 (1982); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

The entry of a prohibitory order is permissible under the First Amendment "where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive" (*In re R.M.J.*, 455 U.S. at 202). So long as the remedy is "reasonably necessary" to prevent deception, it does not contravene the First Amendment. *Id.* at 203; *Litton Industries, Inc.* v. *FTC*, 676 F.2d at 373-374; *United States* v. *Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 965 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982). Courts applying these principles have uniformly held that after finding a statutory violation the Commission may impose a reasonable requirement of prior substantiation, such as the provisions of the order at issue here, without offending the First Amendment. See, *e.g.*, *Bristol-Myers Co.* v. *FTC*, 738 F.2d at 562; *Sears, Roebuck and Co.* v. *FTC*, 676 F.2d at 399-400; *Litton Industries, Inc.* v. *FTC*, 676 F.2d at 373-374; *Jay Norris, Inc.* v. *FTC*, 598 F.2d at 1252. Petitioner therefore has failed to state a First Amendment claim.

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for making the claim. *American Financial Services Ass'n* v. *FTC*, 767 F.2d at 980 n.27; *American Home Products Corp.* v. *FTC*, 695 F.2d at 697.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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